

EXHIBIT J



03-22-1999

U.S. Patent & TMO/TM Mail Rpt Dt. #54 THE UNITED STATES PATENT AND TRADEMARK OFFICE

LAW OFFICE 104

APPLICANT: MYRON MANUFACTURING CORPORATION
SERIAL NO.: 75/389,191
FILED: NOVEMBER 12, 1997
MARK: TOGETHER WE ACHIEVE THE EXTRAORDINARY
EXAMINING ATTORNEY: Anita N. Odonovich
Law Office 104

Assistant Commissioner for Trademarks
BOX NO FEE ATTN LAW OFFICE 104
2900 Crystal Drive
Arlington, Virginia 22202-3513

Sir:

This is in response to an Office Action dated
September 18, 1998.

The refusal to allow the registration of the subject mark
on the Principal Register has been noted. It is respectfully
requested that this refusal be withdrawn for the following reasons.

Nature of the Mark

The mark sought to be registered is a slogan which, as
demonstrated below, has been extensively promoted and used. The
slogan is not a generic term and does not describe any of appli-
cant's goods. Thus, applicant's registration would not deprive
competitors of a term needed to identify or describe similar
products.

Further, it is not a slogan that has been used by others.
For example, neither the search conducted by the Examining Attorney

nor a review of Bartlett's Familiar Quotations (15th Edition 1980) disclosed this slogan or a confusingly similar one. Thus, there do not appear to be any "negatives" in the nature or quality of the slogan to support a refusal to register.

Use as a Trademark and Public Perception

The refusal to register is based on the ground that the slogan is not being used as a trademark and/or is not perceived by the public as a trademark.

Applicant submits that there are at least two reasons why registration should not be refused on these grounds. First, applicant has extensively used the "TM" trademark notice immediately juxtaposed to its TOGETHER WE ACHIEVE THE EXTRAORDINARY trademark in its catalogs, in promotions by which samples of its products are mailed to prospective customers and on many of millions of dollars worth of products sold. Second, since the 1984 decision in In re Astro-Gods Inc., 223 USPQ 621 (TTAB 1984), the general public has become accustomed to seeing numerous trademarks used on products as decorations simultaneously with their source identifying function.

As to the first point, the Declaration of Gwen Zaffe, submitted herewith, shows that applicant has prominently used the "TM" trademark notice with the TOGETHER WE ACHIEVE THE EXTRAORDINARY trademark on millions of samples sent out to promote applicant's goods and its trademark. In addition, applicant has immediately juxtaposed "TM" to its trademark on all the products

which it has sold, except for pens, the barrels of which are too small to bear the "TM" notice legibly. Further, the "TM" notice is used with the TOGETHER WE ACHIEVE THE EXTRAORDINARY trademark in applicant's catalogs. In view of these millions of instances in which persons have seen the trademark TOGETHER WE ACHIEVE THE EXTRAORDINARY trademark together with "TM", it is reasonable to conclude that the slogan is perceived as a trademark to an appreciable segment of consumers and prospective consumers of applicant's goods.

As to the second point, it should be common knowledge that for more than the last ten years many trademarks have come to be used in what could be called a decorative way on T-shirts, sweatshirts, luggage, sneakers and many other products. Therefore, as a result of many trademarks being extensively used in this way (that is, not restricted to being placed only on labels or tags) the public has come to accept this as trademark use, as well as decorative use.

Registrability of Slogans

Finally, it is well settled that distinctive slogans are entitled to registration. See, for example, In re E. Kahn's Sons Co., 145 USPQ 215 (CCPA 1965) (THE WIENER THE WORLD AWAITED registrable for bacon), In re Lincoln Park Van Lines, 149 USPQ 313 (TTAB 1996) (FROM MAINE'S COOL BREEZE TO THE FLORIDA KEYS registrable for moving services). Applicant submits that its slogan has acquired distinctiveness.

Cases Cited by Examining Attorney

Perhaps the most pertinent case cited by the Examining Attorney is In re Astro-Gods Inc., supra, because applicant in that case was using its claimed mark in a manner similar to the present applicant. However, that case is absolutely distinguishable from the present one because applicant submitted no information as to the extent of the sales of goods bearing its mark and the Board concluded that applicant's sales had been minimal. The Board also found that the claimed trademark had not been promoted in such a manner and to such an extent as to create purchaser recognition of it as a trademark. In the present case the facts are diametrically opposite. Applicant has introduced evidence of its vast sales and its almost equally vast promotion through the dissemination of samples of products bearing the mark, together with the "TM" trademark notice.

Certain other cases cited by the Examining Attorney appear to either support the applicant's position that the subject mark is entitled to registration or are distinguishable from the facts in the present application. In In re Owens-Corning Fiberglass Corp., 227 USPQ 1117 (Fed. Cir. 1985), the court held that the color pink as uniformly applied to fibrous glass residential insulation was registrable. It stated, at p. 421, that even if the color was ornamental this did not prevent it from acting as a trademark.

In In re David Crystal, Inc., 132 USPQ 1 (CCPA 1961), two parallel colored bands were refused registration and in In re

Villeroy & Boch S.A.R.L., 5 USPQ 2d 1451 (TTAB 1987), a floral design pattern for tableware. In neither case was there evidence of vast sales or promotion and in terms of registrability slogans can be distinguished from such designs.

TMEP

The Examining Attorney also cited TMEP §1202.04, et seq., in support of the refusal to register. Section 1202.04 states, among other things, that ornamental matter may be classified along a continuum ranging from the inherently distinctive, which is registrable on the Principal Register, to purely ornamental matter, which is unregistrable under any circumstances. Applicant submits that its trademark qualifies for registration under either the second or third category outlined in this Section 1202.04. That is, applicant's slogan can be considered as ornamental (or exhortatory) matter which also serves as an identifier of a secondary source to applicant's customers and prospective customers. This is particularly so since applicant has extensively used the trademark notice "TM" in immediate juxtaposition to its slogan trademark. Such usage conveys to the relevant consumers that TOGETHER WE ACHIEVE THE EXTRAORDINARY is proprietary, that is, it is an identifier of a single source, even though that source may be anonymous.

As to the third category in Section 1202.04, applicant's slogan may be considered as ornamental matter which is neither inherently distinctive nor a secondary source indicator. Rather, applicant's slogan has acquired distinctiveness as a result of

applicant's extensive promotion and sale of products bearing the slogan and because of applicant's use of the "TM" trademark notice in immediate juxtaposition to the slogan.

Identification of Goods

65 The Examining Attorney has objected to an element of applicant's identification of goods. Therefore, applicant requests that caps in International Class 25 be amended to read ["baseball-style caps" in International Class 25.]

Specimens, Dates of First Use, Filing Fees

Applicant has submitted with the application three specimens of use for each class. Applicant has stated the dates of first use and use in commerce for the mark in each class. Applicant has listed the goods by International Class in ascending numerical order and applicant has submitted together with the application its attorney's check No. 8699 in the amount of \$1,715.00 to cover the filing fee in seven classes.

In view of the foregoing, a prompt publication is respectfully requested.

COLUCCI & UMANS
Attorneys for Applicant
101 East 52nd Street
New York, New York 10022
(212) 935-5700

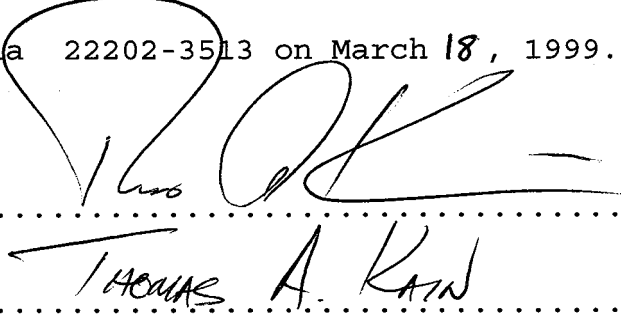
Dated: March 18, 1999
New York, New York

By 
Thomas A. Kain

CERTIFICATE OF MAILING

APPLICANT: MYRON MANUFACTURING CORPORATION
SERIAL NO.: 75/389,191
FILED: NOVEMBER 12, 1997
MARK: TOGETHER WE ACHIEVE THE EXTRAORDINARY
PAPER: RESPONSE TO OFFICE ACTION
MAILED SEPTEMBER 18, 1998

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to the Assistant Commissioner for Trademarks, **BOX NO FEE, ATTN LAW OFFICE 104** , 2900 Crystal Drive, Arlington, Virginia 22202-3513 on March 18, 1999.


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.....
(Type/Print name of person mailing paper/fee)

COLUCCI & UMANS
101 East 52nd Street
New York, NY 10022

EXHIBIT K

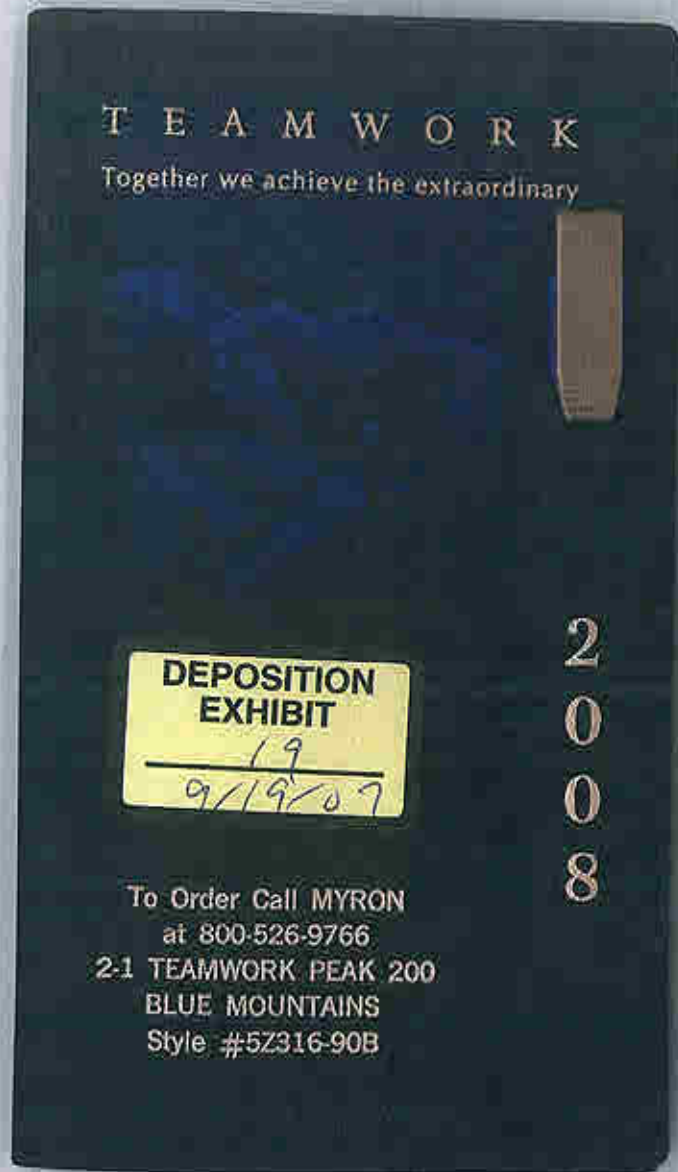


EXHIBIT L

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 MYRON CORP.,
6
7 Plaintiff,

8 vs.

9 HOLLAND USA, INC. D/B/A/
AMSTERDAM PRINTING

10 Defendant.

11 -----x

12 September 19, 2007

13 9:45 a.m.

14
15
16 Deposition of PATRICK CAILLAT, held at
17 the offices of Colucci & Umans, 218 East
18 50th Street, New York, New York before
19 David Henry, a Certified Shorthand Reporter
20 and Notary Public of the State of New York.
21
22
23
24
25

A P P E A R A N C E S:

COLUCCI & UMANS

Attorneys for Plaintiff

218 East 50th Street

New York, New York 10022

BY: RICHARD P. JACOBSON, ESQ.

AND: FRANK J. COLUCCI, ESQ.

FROST ZELNICK LEHRMAN & ZISSU, PC

Attorneys for Defendant

866 United Nations Plaza

New York, New York 10017

BY: MARIO AIETA, ESQ.

ALSO PRESENT:

KEVIN KIRBEY

ROBERT LACK

1 Caillat

2 P A T R I C K C A I L L A T , called as a
3 witness, having been duly sworn, was
4 examined and testified as follows:

5

6 EXAMINATION BY MR. AIETA:

7 Q. Good morning, Mr. Caillat, my
8 name is Mario Aieta, I'm from the firm of
9 Frost Zelnick Lehrman & Zissu, and I'm
10 representing the defendant in this
11 deposition. I'm going to ask you a series
12 of questions this morning. You have to
13 respond to each of my questions with a
14 verbal response. The court reporter cannot
15 note your response if you respond by
16 shaking your head or making a hand
17 movement. If any of my questions is not
18 clear, please feel free to ask me to
19 clarify the question and I'll try to do so
20 for you. And if you need to take a break
21 at some point to rest or use the restroom,
22 just let me know and we can do that.

23 A. Okay.

24 Q. Would you state your name and
25 residence address, please.

1 Caillat

2 A. My name is Patrick Caillat, my
3 residence is 43 White Meadow Road in
4 Rockaway, New Jersey.

5 Q. And are you employed by the
6 plaintiff in this case?

7 A. Yes.

8 Q. And what is your position there?

9 A. Vice-president of CRM marketing.

10 Q. What does CRM stand for?

11 A. Customer relationship management.

12 Q. The plaintiff in this case is
13 Myron Corp. I may refer to the plaintiff
14 at Myron occasionally, if that's not
15 confusing to you.

16 A. Understood.

17 Q. How long have you been employed
18 by Myron Corp.?

19 A. A little over six years.

20 Q. And did you hold a position there
21 prior to your position as VP, CRM
22 marketing?

23 A. Yes.

24 Q. What other positions have you
25 held at Myron Corp.?

1 Caillat

2 A. Prior to that title, my title was
3 vice-president of sales and marketing and
4 prior to that director of marketing.

5 Q. You may have given me this in
6 your previous answer, I'm sorry. How long
7 have you been VP CRM marketing?

8 A. Since last year, since 2006.

9 Q. Do you remember which month?

10 A. I think it was July.

11 Q. What are your responsibilities as
12 VP CRM marketing?

13 A. I am responsible for planning and
14 circulation of promotional material,
15 mailings and catalogues for our prospecting
16 activities, our customer activities, our
17 web activities, for all territories we
18 operate in.

19 Q. And your responsibilities as
20 vice-president marketing, I think that's
21 what you said your job position was prior
22 to the current one, is that right?

23 A. Prior to this position,
24 vice-president of sales and marketing.

25 Q. Okay. And what were your

1 Caillat
2 responsibilities in that position?

3 A. In that position, I was
4 responsible for also sales, meaning
5 outbound telesales for our US, Canada
6 Australia and Japan operations.

7 Q. Did you say outbound telesales?

8 A. Yes.

9 Q. Does that mean by telephone?

10 A. Yes.

11 Q. And the first position you held
12 at Myron was -- I didn't catch the entire
13 title. Sales?

14 A. The first position was director
15 of marketing.

16 Q. Director of marketing. And what
17 were your responsibilities in that
18 position?

19 A. Circulation, planning, for
20 prospect and customer activities for US,
21 Canada, Australia and Japan.

22 Q. Mr. Caillat, would you give me a
23 brief description of your work history
24 prior to joining Myron.

25 A. Prior to Myron, I worked for QVC

1 Caillat
2 as a brand manager for approximately two
3 years and prior to that I worked for the
4 Franklin Mint as a marketing manager for
5 approximately five and a half years.

6 Q. And prior to working at Franklin
7 Mint, were you in school full-time?

8 A. Yes, I was in school. I did a BA
9 and an MBA.

10 Q. And where did you get those
11 degrees from?

12 A. I got a BA from the American
13 University in Paris and an MBA from a
14 school in Paris called ENPC.

15 Q. Mr. Caillat, would you tell me
16 what you did to prepare for the deposition
17 today.

18 A. I reviewed some documents with my
19 attorneys.

20 Q. Did you speak to any employees of
21 Myron?

22 A. I did.

23 Q. Who did you speak to?

24 A. Various people in the
25 organization in the effort of gathering

1 Caillat

2 documents, so people in my department.

3 Q. Do you remember their names?

4 A. Well, I spoke to Susan Waller.

5 Q. What does she do?

6 A. She is a marketing manager.

7 Q. Anybody else?

8 A. I spoke to Jason Riccardi, who is
9 a marketing director.

10 Q. Anyone else?

11 A. And then in another department,
12 the product management product department,
13 I spoke with Michael Probert.

14 Q. What does Mr. Probert do?

15 A. He is the product manager.

16 Q. Did you speak to anybody else in
17 preparation for today's deposition?

18 A. I spoken with Bob, Bob Black, who
19 is here.

20 Q. And what does Mr. Black do?

21 A. Treasurer.

22 Q. Okay, and you recall speaking to
23 anybody else in preparation for today's
24 deposition?

25 A. I spoke with also Joe Albanese.

1 Caillat

2 Q. Who is Mr. Albanese?

3 A. He is director of creative
4 services.

5 Q. Also at Myron?

6 A. Yes.

7 Q. Is that the complete list?

8 A. I think that about covers it.

9 Q. Okay. Now, leaving aside the
10 documents you may have reviewed with your
11 attorneys, did you review any documents on
12 your own in preparation for today's
13 deposition?

14 A. No. The documents I reviewed
15 were the documents that we've got prepared.

16 Q. The documents that you prepared
17 in response to a document request from my
18 firm?

19 A. Yes.

20 Q. Where is Myron Corp. located?

21 A. In Maywood, New Jersey.

22 Q. Does it have any other physical
23 facilities?

24 A. The corporation, Maywood
25 Corporation, that's the only facility I

1 Caillat

2 know of.

3 Q. That's where the corporate
4 offices are?

5 A. Yes.

6 Q. How many people work in the
7 corporate offices?

8 A. I'm not sure.

9 Q. More than 200?

10 A. I'm not sure.

11 Q. You have no idea?

12 A. I don't know because we have a
13 very large seasonal force and so I don't
14 know how that's accounted for.

15 Q. Okay, let's leave out the
16 seasonal force.

17 A. I wouldn't be able to tell you a
18 precise number.

19 Q. Well, how about an imprecise
20 number?

21 A. Well, I'm not going to guess,
22 so --

23 Q. Well, I am asking you to. It's
24 not a guess, it's an estimate. Is it more
25 than 500 people?

1 Caillat

2 A. I don't know.

3 Q. You don't know if there are more
4 than 500 people employed full-time at Myron
5 Corporation?

6 A. Five hundred is probably on the
7 high side, so I wouldn't think it's 500.

8 Q. Okay, is it more than 50?

9 A. Yes.

10 Q. Is it more than 100?

11 A. I don't know. That range, it's
12 somewhere in that range, but I just don't
13 know.

14 Q. Somewhere in the range of 50 to
15 100?

16 A. To 500. I wouldn't be able to
17 tell you exactly.

18 Q. Well, do you park your car there,
19 Mr. Caillat, when you go to work?

20 A. Yes, I do.

21 Q. How many cars in the parking lot?

22 A. As I explained to you, because we
23 have a very large seasonal workforce, that
24 wouldn't be helpful.

25 Q. When does seasonal workforce work

1 Caillat

2 there, Mr. Caillat? During what season?

3 A. It depends on what department.

4 You might have people in production that

5 predominantly are employed as a seasonal

6 workforce in the second half of the year,

7 mostly in the latter part of the year. You

8 might have people who come in for sales

9 purposes to be on the phone for a period of

10 time and then they're not there, and that

11 could be at any time, so it depends. The

12 answer is it depends.

13 Q. Okay, how about right now, today?

14 A. Right now there are quite a

15 number of seasonal workers. I don't have a

16 precise number.

17 Q. Okay, how many people at Myron

18 are managers as far as you're aware?

19 A. I don't have a precise number for

20 you.

21 Q. How many vice-presidents are

22 there?

23 A. Vice-presidents at Myron,

24 including all our international locations,

25 I think there's 10.

1 Caillat

2 Q. How about in New Jersey?

3 A. The number is probably closer to
4 five, but I'm not positive.

5 Q. In discussing the people that you
6 spoke to this morning, you identified two
7 of them as managers. How many managers
8 work in New Jersey?

9 A. I think I just said that I'm not
10 really sure of that number.

11 Q. Okay, is it more than ten?

12 A. I don't know.

13 Q. Is it more than 20?

14 MR. JACOBSON: Object to the
15 line of questioning. He's already
16 answered these questions.

17 MR. AIETA: You can object,
18 Rich, just object. You don't need to
19 do speaking objections.

20 Q. Is it more than 30?

21 A. I don't know.

22 Q. You have no idea?

23 A. If you're going to be in the 30,
24 40, 50 range, that's probably excessive, so
25 it's probably less than that.

1 Caillat

2 Q. Probably less than 30?

3 A. Yes, if I had to guess, which
4 you're asking me to do, which of course is
5 not accurate, then yes, I would say that.

6 Q. Well, I'm asking you to estimate,
7 Mr. Caillat. You've done that before, I
8 take it?

9 A. Yes.

10 Q. Okay, I'm asking you to estimate.

11 A. I just did that. Less than 30.

12 Q. Who is the CFO of Myron
13 currently?

14 A. The CFO's name is Bill Byrne.

15 Q. Was the CFO formerly a gentleman
16 named Mr. Schaefer?

17 A. Yes.

18 Q. When did he cease being CFO at
19 Myron?

20 A. I believe it was February of this
21 year.

22 Q. And why did Mr. Schaefer leave?

23 A. From what he's told me, he wanted
24 to pursue other opportunities.

25 Q. Do you know where he lives?

1 Caillat

2 A. No.

3 Q. You don't know where he lives
4 now?

5 A. No.

6 Q. Do you know where he works?

7 A. No.

8 Q. Would you agree with me that that
9 information is probably available at the
10 records of Myron Corp.?

11 A. Yes.

12 (Deposition Exhibit 1, MYRON 1,
13 marked for identification.)

14 Q. Mr. Caillat, I'm showing you what
15 we've marked as Exhibit 1 for
16 identification. Do you recognize that
17 document?

18 A. Yes.

19 Q. Do you know how this document was
20 generated?

21 A. Yes.

22 Q. How was it generated?

23 A. It was generated by the product
24 department at Myron.

25 Q. How was it generated?

1 Caillat

2 A. It was generated by going through
3 all the SKU's that are currently being sold
4 in relation to teamwork pocket diaries at
5 the moment at Myron.

6 Q. And can you explain to me what
7 that -- what products that includes and
8 what products it would exclude?

9 A. It includes all products that
10 have the trademark Teamwork Peak and the
11 design with the mountain climbers, the
12 trade dress with the mountain climbers.

13 Q. Now, you just used the term the
14 trademark Teamwork Peak. What is that?

15 A. We have, I use sort of a generic
16 term for what I believe to be the phrase,
17 together we achieve the extraordinary,
18 which is a trademark of ours, and a
19 registered phrase of Myron's, and it's
20 associated with the word teamwork and with
21 the design of two mountain climbers, which
22 we refer to that as our trade dress, the
23 combination of the word teamwork and the
24 slogan, together we achieve the
25 extraordinary. So those SKU's represent

1 Caillat

2 all the pocket diaries that include that
3 combination of phrases and that trade
4 dress.

5 Q. So each of the SKU's on this
6 Exhibit 1 include all three of the elements
7 you've described, the word teamwork, the
8 phrase, together we achieve the
9 extraordinary, and an image of two mountain
10 climbers?

11 A. Yes.

12 Q. And all of these SKU's include
13 the same image of two mountain climbers?

14 A. The vast majority I believe so,
15 and I'm not sure whether there is a
16 slightly different image on a couple of
17 them. That's a possibility.

18 Q. How many different mountain
19 climber images are used on Myron products?

20 A. The ones we use right now are, is
21 the one that is used on the vast majority
22 of design. There used to be a slightly
23 tweaked version before that which we only
24 have I believe a couple of SKU's in
25 activity from older repeat buyers on our

1 Caillat

2 file. So predominantly it's the design
3 that we've been featuring in the complaint.

4 Q. Okay, my question actually was
5 how many different mountain climber designs
6 are used by Myron?

7 A. Two that I know of.

8 Q. Two. And the word active on
9 Exhibit 1, is that meant to indicate that
10 these are products currently in your
11 product line?

12 A. Currently being sold, that people
13 can buy from us.

14 Q. Do you use the word teamwork on
15 any other products?

16 A. I believe we do. I believe we do
17 on a keyring, although I'm not sure if
18 that's still an active product we have, I'm
19 not sure we still do.

20 Q. Do you use it on baseball caps?

21 A. No.

22 Q. Do you use it on T-shirts?

23 A. No.

24 Q. Do you use it on pens?

25 A. I don't believe so at the moment.

1 Caillat

2 Q. With reference to the phrase,
3 together we achieve the extraordinary, do
4 you use that phrase on any other products
5 than the products listed on Exhibit 1?

6 A. On products other than --

7 Q. Other than Exhibit 1.

8 A. It's possible. There might be a
9 keyring, as I mentioned earlier. I'm not
10 positive whether we also used it on
11 products that are not calendars at the
12 moment.

13 (Deposition Exhibit 2, MYRON
14 0002-34, marked for identification.)

15 Q. Mr. Caillat, I'm showing you what
16 we've marked as Exhibit 2, which appear to
17 be color photocopies of a number of Myron
18 products, is that correct?

19 A. Yes.

20 Q. Are those all current 2008
21 products?

22 A. Yes, those exist for all 2008
23 products. I see there are a couple that
24 are actual samples with the 2007 border
25 date, but we also have those available with

1 Caillat

2 the 2008 border date, so yes, they would
3 all be existing in the 2008 collection if
4 you will.

5 Q. Okay. Would you turn to page
6 MYRON 0004.

7 A. Yes.

8 Q. Is that a photocopy of a box
9 card?

10 A. That is one of our gift boxes.
11 (Deposition Exhibit 3, Gift Box,
12 marked for identification.)

13 Q. Sir, Exhibit 3 is a gift box?

14 A. Yes.

15 Q. Do you know what products you use
16 Exhibit 3 in connection with?

17 A. In connection with the pocket
18 calendars that we have here.

19 Q. The pocket calendars come in
20 Exhibit 3, some of them do?

21 A. You can get this gift box either
22 because you ask for it, or because that's
23 part of the offer with some of these
24 calendars some of the times.

25 Q. Okay. So not every calendar

1 Caillat

2 ships in a gift box like Exhibit 3?

3 A. No.

4 Q. At times the customer
5 specifically asks for the gift box?

6 A. Yes.

7 Q. That's something they can order?

8 A. Yes.

9 Q. Do they pay extra for that?

10 A. Yes.

11 Q. And sometimes the gift box is
12 part of a product that includes more than
13 one specific product?

14 A. Yes, that's possible.

15 Q. Okay. Could I ask you to look at
16 page MYRON 0014 in Exhibit 2.

17 A. Yes.

18 Q. How long has that particular
19 cover image been in your collection, or in
20 your product line?

21 A. That one predates my time at
22 Myron, so probably, well, it would be
23 before 2001.

24 Q. Okay, so let's go back then to
25 the first page of this exhibit. How long

1 Caillat

2 has that image been in the Myron product
3 line?

4 A. We did a little bit of research
5 and we found early evidence of this as
6 early as 1995.

7 Q. Can you explain to me what you
8 mean by research?

9 A. Well, we've looked in our system
10 for sales activity and we've looked for
11 records of artwork being developed for this
12 design, and we found at the moment the
13 earliest record we found is 1995, which
14 doesn't mean it wasn't there before, it's
15 just the earliest we found so far.

16 Q. Well, do you have -- are you
17 aware of any information to suggest to you
18 that it was there before?

19 A. Not that we've found so far.

20 (Deposition Exhibit 4, MYRON
21 0035-36, marked for identification.)

22 (Deposition Exhibit 5, MYRON
23 0037-40, marked for identification.)

24 Q. Mr. Caillat, I'm going to show
25 you what we've marked as deposition Exhibit

1 Caillat

2 4. That's two pages, correct?

3 A. Yes.

4 Q. Are those an excerpt from a 1995
5 Myron catalogue?

6 A. Yes.

7 Q. How long is the whole catalogue,
8 do you know?

9 A. I'm sorry?

10 Q. The entire catalogue, 1995
11 catalogue, do you know how big it is?

12 A. No, not from the top of my head.

13 Q. Mr. Caillat, did you play a role
14 in collecting catalogues for production to
15 the defendant in this case?

16 A. Yes.

17 Q. Where are those catalogues kept
18 at Myron?

19 A. Well, they're not kept in any
20 particular organized manner. We have some
21 of them in our creative services
22 department, and some people like myself
23 might have copies that they've kept over
24 time.

25 Q. Okay. So in order to collect

1 Caillat

2 them, what did you have to do?

3 A. I spoke with my director of
4 creative service, Joe Albanese, and
5 directed him to find whatever he could
6 find, and that's what he produced.

7 Q. Okay, did you ask him to find one
8 copy of each catalogue for each year?

9 A. To find all the catalogues that,
10 you know, we had produced over the years.

11 Q. So you weren't expecting him, for
12 example, to hand you 30 copies of the 1997
13 catalogue because he happened to have 30?

14 A. Yes, one copy of each.

15 Q. Okay, and the second page of this
16 exhibit shows that teamwork pocket calendar
17 that we've been discussing?

18 A. Yes.

19 Q. Is this the earliest reference to
20 the teamwork pocket calendar you've been
21 able to find?

22 A. Yes.

23 Q. Were you able to find any
24 documents concerning the development of
25 this calendar?

1 Caillat

2 A. Yes, we found files in our
3 computer system that was showing pieces of
4 art that were being used to develop that
5 design.

6 (Deposition Exhibit 6, MYRON
7 0175-0181, marked for identification.)

8 Q. Let me show you what we've marked
9 as Exhibit 6. Are those copies of the
10 artwork you are referring to?

11 A. Yes.

12 Q. Let's take a look at the first
13 image which is on page MYRON 0175, do you
14 see that?

15 A. Yes.

16 Q. Were you able to find any
17 information indicating where that image
18 came from?

19 A. The discussion with my director
20 of creative services is that based on what
21 he has visibility to in the system, it
22 looks like it was a composite of designs
23 that were drawn and things that were used
24 from the public domain and put together to
25 create this design.

1 Caillat

2 Q. Who explained that to you?

3 A. Joe Albanese.

4 Q. Was Mr. Albanese employed by
5 Myron in 1995?

6 A. I don't believe so.

7 Q. Do you know how he determined
8 that these images were in the public
9 domain?

10 A. I'm not sure.

11 Q. If you look at the first page of
12 that Exhibit 7 --

13 A. Exhibit 6 or Exhibit 7?

14 Q. I'm sorry, Exhibit 6. If you
15 look at the first page of Exhibit 6, you
16 will see there is a creation date modified
17 date for the image that's referred to
18 there?

19 A. Yes.

20 Q. Creation date modified date is
21 1998?

22 A. Yes.

23 Q. Did Mr. Albanese explain to you
24 why the creation date would be after the
25 product was created?

1 Caillat

2 A. From what I understand, this
3 actually represents a file that is output
4 for production purposes of the product. So
5 it could have been output at any time,
6 many, many years after the part was created
7 in that particular system that was being
8 used to produce the product and probably is
9 still used to produce the product.

10 Q. Okay, so if you page through this
11 document, you'll see that all except the
12 very last page, each image refers to a date
13 in 1996 or later. Do you see that?

14 A. I see 1996, 1996. Okay.

15 Q. So you would agree with me that
16 all of these pages of Exhibit 6 except the
17 last page probably don't relate to the
18 creation of the image, but relate to the
19 production of the dies and images, is that
20 right?

21 A. I'm not familiar with -- familiar
22 enough with a lot of these screen shots to
23 be able to exactly say what -- they
24 represent whether it's a production file or
25 an art file or something else.

1 Caillat

2 Q. Okay. What about the last page,
3 did Mr. Albanese tell you anything about
4 that?

5 A. Only that this is on file as
6 having been used for the development of the
7 final design.

8 Q. And on file, in what file is it?

9 A. In our computer system.

10 Q. Somehow identified to this
11 design, mountain climber design?

12 A. That's my understanding.

13 Q. Do you know whether or not we
14 have the entire file that has been
15 identified to this mountain climber design?

16 A. I don't know.

17 Q. Do you use e-mail at Myron?

18 A. Yes.

19 Q. I notice there were no e-mails in
20 the documents that have been produced to
21 us. Is it possible that the sales and
22 marketing of the Myron products at issue
23 here have never been discussed in e-mail at
24 Myron Corp.?

25 A. The sales of the products?

1 Caillat

2 Q. Yes, the sales and marketing of
3 this product has never been discussed in
4 e-mails at Myron, is that possible?

5 A. No, I wouldn't say that's
6 possible.

7 Q. What about the discovery of
8 defendant's teamwork products, is it
9 possible that that was never discussed in
10 e-mail by anybody at Myron?

11 A. That's possible.

12 Q. That's possible?

13 A. It is.

14 Q. Okay, did you search your e-mails
15 for any e-mails relating to the defendant's
16 teamwork products?

17 A. I did.

18 Q. How did you do that?

19 A. For anything relating to the
20 questions, I went through my e-mail and
21 tried to find anything relevant.

22 Q. How did you go through your
23 e-mail?

24 A. Well, I was looking for anything
25 around the time of where we saw that design

1 Caillat
2 appear and see if I had any other
3 conversations at that time, so I kind of
4 went by date, since July, June, July, which
5 is when we started seeing that design
6 appear, seeing anything relevant during
7 that time period.

8 Q. And how did you look through your
9 e-mails?

10 A. Just browsing through.

11 Q. Just went through them one by one
12 or --

13 A. Browsing through anything that
14 seemed relevant to teamwork, that had
15 teamwork for example in it or that had a
16 title that seemed relevant.

17 Q. How did you browse through them?

18 A. Just looking at the names of the
19 e-mails.

20 Q. You looked at the subject line of
21 the e-mail?

22 A. The subject line of the e-mail.

23 Q. Do you use Microsoft Outlook for
24 your e-mail client?

25 A. Yes.

1 Caillat

2 Q. And you looked through e-mails
3 that were in your inbox?

4 A. Inbox and whatever was archived.

5 Q. Archived?

6 A. Yes.

7 Q. What do you mean by archived?

8 A. E-mail archives.

9 Q. And what do you mean by archives?

10 A. Older e-mails that are not in the
11 inbox, but are archived.

12 Q. And do you let the program
13 Outlook do that or do you do it?

14 A. No, I went through that date
15 range.

16 Q. No, I'm talking about the
17 archive. When you refer to archive, is
18 that the archive created automatically by
19 the Outlook program when it occasionally
20 asks you whether or not you want to archive
21 e-mails or is it some other process by
22 which e-mails are archived?

23 A. I personally archive my e-mail
24 periodically. That's how I do it.

25 Q. And when you do that, do you put

1 Caillat

2 all your e-mails in one folder called
3 archive or are they broken down by subject
4 or client?

5 A. They retain their original folder
6 in which they are stored.

7 Q. So you have an archive inbox?

8 A. Yes, I do.

9 Q. And so documents or e-mails that
10 were in your inbox are archived in your
11 archive inbox?

12 A. Say that again?

13 Q. E-mails that were in your inbox
14 when you archived them, they are moved to
15 your archived inbox?

16 A. That's a good example.

17 Q. Is that right?

18 A. Yes.

19 Q. Did you ask anybody else to
20 search e-mails relating to defendant's
21 products, if any?

22 A. No, I did not.

23 Q. I will show you Exhibit 5. Now,
24 that's an excerpt from another Myron
25 catalogue, correct?

1 Caillat

2 A. Yes.

3 Q. And is that the 1996 catalogue?

4 A. Yes, it says spring, 1996.

5 Q. And is that a reference to when
6 the catalogue is distributed?

7 A. Yes.

8 Q. Mr. Caillat, which year did you
9 say you started work, at --

10 A. 2001.

11 Q. At Myron, 2001. And your current
12 position, when did you start?

13 A. 2006.

14 Q. Mr. Caillat, earlier this morning
15 you referred to the word teamwork as a
16 trademark. Do you remember that?

17 A. Yes.

18 Q. Why do you consider that word to
19 be a trademark?

20 MR. JACOBSON: Objection. You
21 can answer.

22 A. I think what I explained is that
23 the registered phrase that I was referring
24 to when I was referring to teamwork
25 products was specifically, together we

1 Caillat

2 achieve the extraordinary, phrase is
3 registered.

4 Q. Okay, so does that mean you don't
5 consider the word teamwork to be a
6 trademark?

7 MR. JACOBSON: Objection.

8 A. I'm not -- that is something we
9 have an application pending for, so I don't
10 know the technical answer on that one.

11 Q. But it's your understanding you
12 have an application to register the word
13 teamwork as a trademark pending in the
14 United States?

15 A. Yes.

16 Q. Do you consider any other single
17 word other than the word Myron to be a
18 trademark of the Myron Corporation?

19 A. Any single word?

20 Q. Yeah, any single word. Teamwork
21 is a single word. Do you consider any
22 other single word to be a trademark of the
23 Myron Corporation?

24 A. I'm not aware of a single word
25 that's a trademark of Myron.

1 Caillat

2 Q. You're not aware of any others?

3 A. No. That doesn't mean there
4 aren't, but I'm not aware.

5 Q. Would it be fair to say that
6 given your responsibilities at the company,
7 if there were other single word trademarks,
8 you might be aware of them?

9 A. Yes.

10 Q. What about the phrase, we've got
11 the gift for building business? Do you
12 consider that to be a Myron trademark?

13 A. I do.

14 Q. How long has Myron been using
15 that trademark?

16 A. I would say approximately at
17 least three years.

18 Q. And how is that mark used?

19 A. Typically in conjunction with the
20 Myron logo.

21 Q. And how do you present that mark
22 to consumers? Do you put it on products,
23 do you put it in catalogues, in mailings?

24 A. Yes, we put it on advertising
25 material, possibly on letterhead, on the

1 Caillat

2 website.

3 Q. Is it on any products?

4 A. I don't believe so.

5 Q. What kind of advertising does
6 Myron do?

7 A. We send samples of our products
8 through the mail. We advertise our
9 products on our website, we produce
10 catalogues or brochures. Those are our
11 main ways of advertising.

12 Q. Are there any other ways of
13 advertising?

14 A. In the past we've also published
15 some media ads in newspapers or magazines,
16 and you know, in general, I don't know if
17 you consider that means of advertising, but
18 we do speak to our customers on the phone,
19 so we have conversations about our product
20 on the phone as well.

21 Q. Do you have sales people who do
22 the phone work?

23 A. Yes, we do.

24 Q. Do you have scripts for them?

25 A. Occasionally, but it's mostly in

1 Caillat

2 the relationship of the customer that the
3 conversation occurs, so it's not really
4 scripted per se.

5 Q. Do you have guidelines for them?

6 A. We do.

7 Q. Have those materials been
8 included in any of the production here?

9 A. No.

10 Q. Do you know whether or not the
11 teamwork products that we've been
12 discussing this morning are mentioned in
13 any of the scripts or guidelines that your
14 sales people use on the telephone?

15 A. No, I don't know.

16 Q. What was the last time Myron did
17 media advertising as far as you know?

18 A. The latest possible date would
19 have been in 2005.

20 Q. And was that all print
21 advertising?

22 A. Print media, yes.

23 Q. No radio or television?

24 A. Correct.

25 Q. Does Myron maintain copies of the

1 Caillat

2 print advertising at its facilities?

3 A. I am sure there are copies.

4 Q. Do you know who is responsible
5 for maintaining them?

6 A. If there are copies, there is no
7 particular process or responsibility for
8 maintaining that, so it would be anecdotal,
9 if they are found.

10 Q. So as far as you are aware, there
11 is no specific file folder or cabinet that
12 says media advertising on it?

13 A. I might have some, the guy next
14 door might have some, but that's about it.

15 Q. Does Myron Corp. have a document
16 management system for electronically stored
17 information?

18 A. No.

19 Q. Does Myron Corp. have a formal
20 document management system for documents
21 that are not in electronic format?

22 A. That's a very broad question.
23 You know, the various departments might
24 have different policies.

25 Q. Is there a central file room?

1 Caillat

2 A. For what?

3 Q. Myron Corporation.

4 A. For what types of documents?

5 Q. For corporate documents

6 generally.

7 A. I don't know.

8 Q. Are you aware of a document
9 retention policy that Myron Corporation
10 has?

11 A. No, I am not aware of a document
12 retention policy.

13 Q. What about your department, does
14 your department have a document retention
15 policy?

16 A. I can't say that we do.

17 Q. Do you have a particular practice
18 that you implement in your department?

19 A. We have practices, yes, not
20 policies, we have practices such as
21 trying -- well, let me speak of my
22 department first and then I can speak of
23 departments I know of. In my department we
24 try to keep samples of some of the mailings
25 that we send or some of the catalogues that

1 Caillat
2 we send so we can have them for future
3 reference. In a department that works also
4 at Myron, the product department, they have
5 a practice of logging competitive
6 information, advertising material for
7 competitors, also for reference.

8 Q. Which department is that?

9 A. The product department.

10 Q. Product department. And do you
11 know if the product department practice is
12 described in any written document?

13 A. I don't know.

14 Q. Did you have a chance to review
15 the deposition notice that brings you here
16 today?

17 A. I have.

18 Q. You may recall one of the
19 categories of information that is listed on
20 that deposition notice is the first date of
21 awareness by Myron Corp. of the line of
22 calendars identified in the complaint in
23 this action as defendant's teamwork
24 products.

25 Did you take any steps to

1 Caillat
2 familiarize yourself with any information
3 or knowledge available to Myron Corp.
4 concerning the first date on which you
5 became aware of defendant's teamwork
6 products?

7 A. I did.

8 Q. What did you do?

9 A. I spoke with Mike Probert in the
10 product department and I looked at
11 advertising material that I had received
12 myself.

13 Q. And why did you choose to speak
14 to Mike Probert for this purpose?

15 A. Because he is the product manager
16 in charge of pocket calendars, which is the
17 product form that's in question.

18 Q. And it's not clear to me how your
19 response answers my question. So because
20 he is that person, why does it make sense
21 to talk to him about the first awareness?

22 A. Because as a practice, he would
23 be looking out for competitive information,
24 samples of catalogues, and hopefully
25 logging them as they arrive, he or his

1 Caillat

2 team.

3 (Deposition Exhibit 7, MYRON
4 0182-0199, marked for identification.)

5 Q. Mr. Caillat, I'm showing you
6 what's been marked as Exhibit 7 which is
7 Bates numbered MYRON 0182 through 0199.
8 And is this one of the logs you were just
9 describing for me?

10 A. Yes.

11 Q. Where is this log maintained at
12 Myron?

13 A. It's maintained on a computer in
14 the product department.

15 Q. It's maintained in the form of a
16 spreadsheet?

17 A. Yes.

18 Q. And it's your understanding that
19 this is updated periodically?

20 A. Yes.

21 Q. Who contributes information to
22 this spreadsheet as far as you're aware?

23 A. As people receive promotional
24 material in the organization from various
25 competitors, they attempt to pass them

1 Caillat

2 along to the product department for their
3 review.

4 Q. And then who enters the
5 information into the spreadsheet?

6 A. I believe the person who did this
7 is Kalpita Ramani.

8 Q. Now, are you aware of some
9 guidelines that dictate or guide what gets
10 entered into this spreadsheet?

11 A. No, other than they do their best
12 to capture what they come across, whether
13 it be by catalogue sample or e-mail.

14 Q. And who is they?

15 A. The product department.

16 Q. And who decides what information
17 to enter into the spreadsheet?

18 A. I don't know.

19 Q. You don't decide?

20 A. I don't decide. That department
21 does not report in to me.

22 Q. Would you look at page 184, and
23 the bottom entry on the left side,
24 6/15/2007, sample received (Probert
25 Associates) do you see that?

1 Caillat

2 A. Yes.

3 Q. Do you know what Probert
4 Associates refers to?

5 A. I believe it's the name under
6 which he received that mailing, and I
7 believe that that's a name that has an
8 address at his home.

9 Q. Sorry, he is Mike Probert?

10 A. Yes, I'm sorry, Mike Probert.

11 Q. Do you know where Mr. Probert
12 lives?

13 A. No.

14 Q. The entry says sample received
15 (Probert Associates of teamwork) diary
16 depicting "geese flying in formation" on
17 June 15 (home) and brought to the attention
18 of Myron senior management on 6/18/07.
19 Sample was sent to outside counsel.

20 Do you know who Myron senior
21 management is?

22 A. That would be myself or the
23 owners. I'm not sure exactly who he is
24 referring to here.

25 Q. Do you recall whether or not the

1 Caillat

2 sample in question was brought to your
3 attention on or about June 18?

4 A. Yes, he did bring it to my
5 attention at some point after that.

6 Q. Now, what about samples that you
7 receive, are they ever entered into this
8 log?

9 A. Occasionally.

10 Q. But not always?

11 A. Not always.

12 Q. And you do receive samples,
13 right?

14 A. Occasionally I do.

15 Q. And you receive them at your work
16 address?

17 A. Yes.

18 Q. Do you receive them at your home
19 address?

20 A. No.

21 (Deposition Exhibit 8, MYRON
22 0241-0277, marked for identification.)

23 Q. Mr. Caillat, let me show you what
24 we've marked as Exhibit 8. Can you
25 identify those documents?

1 Caillat

2 A. The first one is a letter from
3 Amsterdam Printing addressed to me at
4 Myron --

5 Q. Okay, rather than going through
6 them page by page, which I think may not be
7 necessary, can you characterize the entire
8 group of documents?

9 A. Okay, let me go through them real
10 quick. Okay, so they are a set of mailing
11 offers addressed to me at Myron
12 Corporation, various pocket calendar
13 product offers from Amsterdam.

14 Q. And do you know over what period
15 of time you received those mailings?

16 A. I can determine that because --
17 well, on some of these I see the envelope
18 has been printed and there's a date, so
19 there's some in 2007, and if I recall
20 correctly there is some in 2006, yes, here
21 is one. So 2006 and 2007 it looks like.

22 Q. So those are some or all of the
23 samplers that you received from Amsterdam?

24 A. Some.

25 Q. During that period of time, some.

1 Caillat

2 A. Some, the ones that I could find.

3 Q. Do you keep these in someplace in
4 your office?

5 A. I occasionally keep them,
6 occasionally discard them, occasionally
7 pass them along to someone else in the
8 product department. So I don't keep them
9 in a particular place or any particular
10 organized manner.

11 Q. Do you know if there's anybody
12 else at Myron who receives samplers in the
13 mail from Myron's competitors?

14 A. Yes, I know a few people.

15 Q. Can you give me the names of the
16 people you know of who receive samples?

17 A. The people I know of include
18 myself obviously, Mike Probert, Louisa
19 Gormley, Kalpita Ramani I believe, and
20 there might be more, but those are the ones
21 that I know of.

22 Q. Do you know why Mr. Probert
23 brought the sampler that he received with
24 the flying geese to your attention?

25 A. Yes.

1 Caillat

2 Q. Why?

3 A. He was concerned that the
4 conjunction of the word teamwork, the
5 phrase that was being used, the design that
6 had a color scheme and a feel to it was
7 very, very similar to our trade dress, and
8 that it was, you know, a concern for
9 infringement.

10 Q. And were you the right person to
11 advise? Was bringing it to your attention
12 the correct person?

13 A. I'm one of the persons that
14 should know about it so that it can be
15 discussed with our lawyers. He might have
16 discussed it with other people as well.

17 Q. Do you recognize the name Elena
18 Capicchioni?

19 A. No, I can't say that I do.

20 Q. Do you recognize the name Barbara
21 Chrencik?

22 A. Yes.

23 Q. Who is Barbara Chrencik?

24 A. She is a manager at Myron.

25 Q. What department?

1 Caillat

2 A. In the credit and collection
3 department.

4 Q. And who does she report to?

5 A. I'm not sure.

6 Q. Do you know of any specific
7 person at Myron whose last name is Smith
8 whose first name begins with the letter M?

9 A. No.

10 Q. The address that appears on the
11 envelope on the first page of Exhibit 8, is
12 that the corporate headquarters of Myron?

13 A. Yes.

14 Q. If mail is sent to Myron Corp.
15 addressed to Myron Corp. and not to any
16 particular individual, do you know what
17 happens to that mail?

18 A. No.

19 Q. Is there someone at Myron Corp.
20 who might know what happens to that mail?

21 A. We'd have to find out.

22 Q. Is there a mailroom?

23 A. Yes, there are individuals in
24 charge of picking up the mail, so we'd have
25 to find out.

1 Caillat

2 (Recess taken.)

3 FURTHER EXAMINATION BY MR. AIETA:

4 Q. Mr. Caillat, we're back on the
5 record. Other than yourself and
6 Mr. Probert, are you aware of anybody else
7 employed by Myron who receives samplers or
8 catalogues from Amsterdam Printing?

9 A. In asking to the various people
10 in my department, I found that various
11 people had received various samples and I
12 tried to collect those, not remembering
13 exactly who got what, but there were some
14 other individuals, and it's quite possible
15 that other people might be receiving
16 samples, but not that I've found so far.
17 So the short answer is yes, some other
18 people were receiving samples, I gathered
19 the ones that I could find.

20 Q. What about catalogues, do you
21 know whether other people received
22 catalogues?

23 A. Same answer on that.

24 Q. Those who received samples could
25 have received catalogues?

1 Caillat

2 A. Yes.

3 Q. Do you remember whether or not
4 you've ever received a catalogue from
5 Amsterdam Printing?

6 A. Yes.

7 Q. You have?

8 A. Yes, I have.

9 Q. Do you remember the names of the
10 people you've identified as people who may
11 have identified catalogues or samples from
12 Amsterdam Printing?

13 A. I think I mentioned earlier that
14 Louisa Gormley and Kalpita Ramani I believe
15 received calendars and samples, and I think
16 I have found -- I had found in the samples
17 that I had found going around, possibly
18 some things that might have been addressed
19 to Susan Waller as well. There might have
20 been other samples that we found from
21 people that may or may not be at Myron any
22 more, I don't remember specifically the
23 names.

24 Q. Let me show you what we'll mark
25 as the next exhibit.

1 Caillat

2 (Deposition Exhibit 9, MYRON 0174,
3 marked for identification.)

4 It's stamped 0174 with the Myron
5 stamp and I ask you to tell me what that
6 document is.

7 A. This is the amount of advertising
8 spent that we've incurred, Myron
9 Corporation, since 2002 in promoting
10 teamwork, using the teamwork word in a
11 broad sense, teamwork related pocket
12 calendars, teamwork themed pocket calendars
13 with the mountain climbers and so on and so
14 forth.

15 Q. Can you tell me what the row that
16 is captioned customer means?

17 A. That represents the advertising
18 spent when we send promotional material to
19 our own customers.

20 Q. And prospects, what does that
21 mean?

22 A. Prospects represents advertising
23 spent that we have incurred in promoting
24 those products to prospects by renting
25 outside names from the business community.

1 Caillat

2 Q. And can you explain for me how,
3 let's just pick one number, customer 2002,
4 the number \$118,186, and can you explain to
5 me how that was calculated?

6 A. That's -- we have in our system,
7 we track the samples, the number of samples
8 that we send by promotion and then we're
9 able to add it all up annually and we will
10 precisely determine that for the particular
11 number of SKU's, this is the number of
12 pieces that we've sent and this is the
13 amount of money that was associated with
14 those campaigns.

15 Q. So included within this number is
16 the cost to Myron of producing the sample
17 mailings?

18 A. It is included, yes.

19 Q. Is there anything else included
20 in that number?

21 A. The cost of the envelope,
22 printing the letter, inserting all these
23 components into the package, and the
24 postage, so all the costs that are directly
25 attributed to promotion.

1 Caillat

2 Q. And when you say this is related,
3 I forget exactly how you phrased it, but
4 related to the teamwork SKU's, in what way
5 is it related to those SKU's?

6 A. It represents older mailings that
7 were sent in which the teamwork SKU's were
8 sampled.

9 Q. And in those mailings, would the
10 teamwork SKU be the only sample?

11 A. In the spending?

12 Q. Yes.

13 A. That's what this represents, yes.

14 Q. Do you send out sample mailings
15 with more than one SKU in each envelope or
16 package?

17 A. No, not that I can think of.

18 Q. In the numbers that appear under
19 the lines, or across the rows for customer
20 and prospect, do those numbers include any
21 catalogue costs?

22 A. No.

23 Q. And you have a separate number
24 there for catalogue costs. Can you tell me
25 what that means?

1 Caillat

2 A. Yes. We've tried to do an
3 estimation of the catalogues that we spent
4 that we mailed in that time period, and for
5 the cost of sending out those catalogues,
6 what was the proportion of the space in
7 those catalogues that was dedicated to the
8 teamwork SKU's.

9 (Deposition Exhibit 10, Myron
10 2007/2008 Catalogue, marked for
11 identification.)

12 Q. We've marked as Exhibit 10 the
13 2007 Myron catalogue, is that correct?

14 A. Yes, it's 2007/2008.

15 Q. When was this catalogue first
16 sent to customers or prospects?

17 A. This catalogue was sent only to
18 customers, and I believe it was mailed in
19 August of this year.

20 Q. Do you ever send catalogues to
21 prospects?

22 A. Very rarely. We have in the
23 past.

24 Q. With reference to your
25 description to me of how the catalogue

1 Caillat

2 costs shown in Exhibit 9 were calculated,
3 can you explain to me with reference to
4 Exhibit 10 how that calculation was made?

5 A. Yes, I can. Well, I can give you
6 my -- a description of how I believe it was
7 calculated. The exact calculation, since I
8 did not do it, it would not be fair for me
9 to give you a formula or something like
10 that, but the general concept is that if
11 you have, if the cost of this book, let's
12 say it's a dollar to make it easy, and you
13 have the amount of surface, the number of
14 pages, that is say ten percent dedicated to
15 the teamwork related SKU's, then we would
16 do as an estimation that ten percent of a
17 dollar, ten cents was spent per catalogue
18 on advertising teamwork related SKU's.
19 That's how we would do that.

20 Q. Does this catalogue contain all
21 of the products that Myron offers to
22 customers or prospects currently?

23 A. No, I don't believe it includes
24 all products.

25 Q. Do you know how many SKU's Myron

1 Caillat

2 currently has that it offers to customers?

3 A. It's in the hundreds. I don't
4 have a precise number.

5 Q. Is there another catalogue that
6 contains products currently offered to
7 customers or prospects that are not in this
8 catalogue?

9 A. We do have some other brochures.
10 They do not feature the teamwork product
11 though. For example there is a small
12 brochure containing holiday cards.

13 Q. The trade dress that's at issue
14 in this case, that's referred to
15 internally, or I'm sorry, that's referred
16 to by Myron in its catalogue as a theme,
17 correct?

18 A. Is it?

19 Q. I'll tell you what, I will
20 withdraw that question. How about on the
21 website, it's referred to on the website as
22 a theme, is it not?

23 A. Yes, I believe the word theme is
24 used.

25 (Deposition Exhibit 11, MYRON

1 Caillat

2 0155-0164, marked for identification.)

3 Q. I'm showing you what we've marked
4 as Exhibit 11. Do you recognize those
5 pages?

6 A. Yes.

7 Q. Can you tell me what they are?

8 A. They are from the Myron website.

9 Q. They are printouts of the Myron
10 website?

11 A. Yes.

12 Q. And are you responsible for the
13 content of the website?

14 A. Ultimately, yes.

15 Q. How often is the website updated?

16 A. It's on an ad hoc basis, but
17 typically something changes every week.

18 Q. Let me ask you to turn your
19 attention back to Exhibit 10, the
20 catalogue. I may -- I think I asked you a
21 question but I'm not sure I got the answer.
22 When was this first sent out to customers?

23 A. I believe in August of this year.

24 Q. August of 2007?

25 A. 2007.

1 Caillat

2 Q. When do prospects first begin to
3 receive promotions for the products in this
4 catalogue? Let me start again. You have
5 dated products in the catalogue, correct?

6 A. Yes.

7 Q. Calendars and desk sets and that
8 sort of thing, correct?

9 A. Yes.

10 Q. This catalogue that's Exhibit 10
11 has dated products for the year 2008, is
12 that correct?

13 A. Yes.

14 Q. When do you first begin to send
15 prospects, promotions for dated products
16 for 2008?

17 A. Typically in July, so for this
18 year, for 2008 products, we began in July,
19 2007.

20 Q. That's when you first started to
21 send out promotions for 2008 dated
22 products?

23 A. Yes.

24 Q. And when do you begin to take
25 orders for 2008 dated product?

1 Caillat

2 A. In that same month, July. For
3 prospects you're talking about?

4 Q. For prospects.

5 A. Yes.

6 Q. Does there come a point in time
7 where generally you no longer receive
8 orders for 2008 dated products?

9 A. Yes.

10 Q. I'm asking in reference to prior
11 years. A dated product for a specific
12 year, does there come a point in time where
13 you no longer receive orders for that dated
14 product?

15 A. Yes.

16 Q. About when in the calendar year
17 does that take place?

18 A. December.

19 Q. And during the period between
20 July and December, is there any particular
21 period when you are receiving most of your
22 orders or more orders? Month by month or
23 biweekly or --

24 A. From a prospects standpoint, I'd
25 say it's fairly even in those months.

1 Caillat

2 Q. From July to December?

3 A. Right, and it tends to decline
4 towards the December time frame.

5 Q. Okay, and what about for
6 customers?

7 A. For customers we take orders all
8 year long, so it's fairly even all year
9 long.

10 Q. For dated products as well?

11 A. For dated products, yes.

12 Q. When do you begin to shift dated
13 products to your customers?

14 A. Normally in July.

15 Q. If you receive an order for a
16 dated product from a customer in May, do
17 you hold that until some later point in
18 July or August?

19 A. Yes, July or later.

20 Q. And are your customers able to
21 ask you for a specific ship date or do you
22 ship them at a time that you determine?

23 A. Yes, they can ask for a ship
24 date.

25 Q. Those customers who ask for a

1 Caillat

2 ship date, is there any particular time
3 when generally customers ask for their
4 dated products to be shipped?

5 A. I'd say it's fairly even between
6 July and October, maybe November.

7 (Deposition Exhibit 12, MYRON
8 0165-0173, marked for identification.)

9 Q. I'm showing you what we've marked
10 as Exhibit 12, and do you recognize those
11 documents?

12 A. Yes.

13 Q. Can you tell me what they are?

14 A. They are copies, photocopies or
15 scans of some Myron pocket calendar offers,
16 and the sample itself, the product sample.

17 Q. Are these types of offers sent to
18 customers or prospects or both?

19 A. Well, let me go through it again.
20 We have some of both in this printout, in
21 these printouts.

22 Q. Is it possible for you to
23 distinguish between -- by page number
24 between those sent to customers and those
25 sent to prospects?

1 Caillat

2 A. Yes.

3 Q. Can you do that for me?

4 A. Just starting from the top?

5 Q. Yes.

6 A. 0165, prospects; 0166, prospects;

7 0167, customer; 0168, prospects; 0169,

8 customer; 0170, prospects; 0171, customer;

9 0172, customer; 0173, customer.

10 Q. And would it be fair to call
11 these sample mailings?

12 A. Yes.

13 Q. Do you sample products other than
14 the teamwork products that are featured in
15 Exhibit 12 here?

16 A. Yes.

17 Q. How many other products do you
18 sample?

19 A. Dozens.

20 Q. Dozens of different products a
21 year?

22 A. Yes.

23 Q. And all of the products that you
24 sample are accompanied by some form of
25 letter like this?

1 Caillat

2 A. Yes.

3 Q. Mr. Caillat, do you have a
4 minimum order for a product like this
5 teamwork product?

6 A. Yes.

7 Q. What is the minimum order?

8 A. Fifty pieces.

9 Q. And do you know what the total
10 value of the order would be, pieces mailed
11 altogether, how much would the customer
12 have to pay?

13 A. For what?

14 Q. For the minimum order that one
15 could place for this product.

16 A. Well, it depends on the SKU
17 obviously. Not all SKU's are priced the
18 same, so say the SKU is three fifty for 50,
19 then it's a three fifty times 50.

20 Q. Do you know what your lowest
21 price teamwork SKU is?

22 A. Not from the top of my head, no.

23 Q. It's always 50 is the minimum?

24 A. Yes, for these pocket calendars.

25 Q. Do you have a sense of what the

1 Caillat

2 average order size is?

3 A. Yes.

4 Q. What is the average order size?

5 MR. JACOBSON: I'm going to
6 object. I think we may be getting
7 into some confidential counsel only
8 material.

9 -----

10 **CONFIDENTIAL ATTORNEYS' EYES ONLY

11 MATERIAL BOUND SEPARATELY**

12 -----

13 Q. Mr. Caillat, are you aware of any
14 instances when any company other than Myron
15 or Amsterdam has used the word teamwork in
16 connection with dated calendar products?

17 A. Since we've looked at what
18 Amsterdam has started doing, I believe
19 we've identified something from Union that
20 was similar, a company called Union.

21 Q. Any other instances that you are
22 aware of?

23 A. And there was I believe another
24 one, but I don't remember the name of the
25 company that was just discovered, a company

1 Caillat

2 that I had never heard of and I still don't
3 remember the name.

4 Q. Windmill?

5 A. That's the one.

6 Q. Are you aware of any companies
7 using the word teamwork on inspirational
8 products other than desk calendars?

9 A. Yes, I've seen it.

10 Q. What kinds of products have you
11 seen it on?

12 A. I've seen posters and things of
13 that nature, mostly posters type things.

14 Q. What about wall calendars?

15 A. I'm not sure if I've seen that on
16 wall calendars, but I've seen posters, for
17 example.

18 Q. Are you familiar with, or are you
19 aware of any company other than the
20 defendant here using a phrase identical to
21 or substantially similar to the phrase,
22 together we achieve the extraordinary, on
23 dated materials?

24 A. No.

25 Q. What about on inspirational

1 Caillat

2 materials or corporate materials?

3 A. No.

4 Q. Myron's teamwork calendars are
5 good sellers?

6 A. Yes, it's our single biggest
7 branded brand.

8 Q. Why do you think that's the case?

9 A. Our customers like it.

10 Q. Why do you think they like it?

11 A. You have to ask them.

12 Q. Has Myron ever asked their
13 customers why they like this product?

14 A. They like our products for many
15 reasons. Some of them like -- yes, the
16 answer to your question would be yes. We
17 haven't done specifically a survey on
18 teamwork, if that's what you're asking me.
19 We've done surveys from our customers in
20 general, you know, people might like this
21 because they think it's a good message and
22 they like to keep that message, they
23 associate with that message, and they are
24 customers themselves to which they give the
25 product associated with that message, so

1 Caillat

2 they feel that it represents their company
3 well, for example.

4 Q. But you haven't done that testing
5 or you haven't asked those questions with
6 respect to a teamwork product?

7 A. Not specifically, no. It's come
8 up occasionally in various discussions,
9 like a focus group for example.

10 Q. Focus groups, have you done focus
11 groups?

12 A. We have done focus groups, yes.

13 Q. When was the last time you did
14 focus groups?

15 A. Earlier this year we did one.

16 Q. What kind of data was generated
17 by the focus group?

18 MR. JACOBSON: I just want to
19 caution the witness if you're going to
20 discuss proprietary information, then
21 we'll have to ask Mr. Kirbey to leave
22 the room again.

23 A. What I was going to say perhaps
24 to not get into that is the last one we did
25 really did not relate to pocket calendars,

1 Caillat
2 so perhaps I could bring us to another time
3 in the past where we've done one relative
4 to calendars that would be more appropriate
5 for discussion. Because if you're going to
6 talk about the last one, then I can't
7 discuss it.

8 Q. That's fine, and just to be
9 clear, I'm not going to ask you -- with
10 respect to the last one, I'm not asking you
11 to identify the kind of product or any
12 identifying features about the product.
13 Let's just leave the product itself totally
14 out of it. My question was what kind of
15 data was generated? Did you get a written
16 report, did you get a videotape of a focus
17 group?

18 A. Yes, a written report, and I
19 believe a video discussion.

20 Q. Is there any other kind of data
21 that you recall being generated from that,
22 a Powerpoint presentation, handwritten
23 notes of people who attended the
24 discussion?

25 A. Yes, and again, that last one was

1 Caillat

2 not pertaining to --

3 Q. Exactly. There were handwritten
4 notes?

5 A. Yes.

6 Q. Okay, notes taken by the Myron
7 attendees?

8 A. Yes.

9 Q. Were there notes taken by the
10 people who conducted the focus group for
11 you?

12 A. Not handwritten notes, no. We
13 produced a report.

14 Q. Let's go then to the prior focus
15 group which you suggested may have related
16 in some way to calendar products, is that
17 right?

18 A. Yes.

19 Q. When did that focus group take
20 place?

21 A. Last year.

22 Q. In 2006?

23 A. Yes.

24 Q. Again, just focusing on the
25 result, the manner in which the result was

1 Caillat

2 presented, did you obtain a written report
3 from that focus group?

4 A. I believe we did.

5 Q. Did you obtain a videotape of the
6 focus group discussions?

7 A. I'm not sure about that one.

8 Q. Did you obtain, or did you
9 collect notes from the Myron attendees?

10 A. I don't know if notes were
11 collected.

12 Q. Did you attend that presentation?

13 A. Yes.

14 Q. Did you yourself make notes?

15 A. I might have, yes.

16 Q. And do you know if you still have
17 yours?

18 A. I don't know.

19 Q. What about the written report, do
20 you know if you still have that or if Myron
21 still has that?

22 A. I assume we do.

23 Q. Is there someone, or is there a
24 way that you would search to determine
25 whether or not you have a videotape of that

1 Caillat

2 focus group?

3 A. Yes.

4 Q. But as you sit here today, you're
5 not sure if you do or not?

6 A. I'm not sure if we had one or not
7 in this particular case.

8 Q. Now, at that focus group, what
9 did that focus group relate to?

10 A. It was about one of our lines of
11 calendars, but it was not specifically on
12 teamwork, but some of the -- some of those
13 products might have had some teamwork
14 design.

15 Q. Okay, did those products feature
16 another inspirational phrase or slogan?

17 A. I'm not really sure. There were
18 lots of concepts and things that were
19 presented. I'm not sure on the details.

20 Q. Do you recall whether or not that
21 focus group involved products that Myron
22 actually sold at the time?

23 A. I believe so.

24 Q. Other than the defendant in this
25 case and other than Union Pen and Windmill,

1 Caillat

2 are you aware of any other company that's
3 using a trade dress that you consider to be
4 similar to that used by Myron?

5 A. No.

6 Q. Are you aware of any evidence of
7 confusion between the products made by
8 Myron Corp. and the products made by the
9 defendant in this case?

10 A. Since it is practically new, no.

11 Q. And what do you mean by
12 practically new?

13 A. It appeared on our radar screen
14 in June.

15 Q. It being defendant's product?

16 A. Yes.

17 Q. You mentioned that Myron did some
18 print media advertising. You may have also
19 said this during your answer, I don't
20 recall. Did that print media advertising
21 relate in any way to the teamwork products?

22 A. I don't know. We'd have to try
23 to find some examples of that. It's such a
24 small -- it was such a small portion of our
25 advertising effort.

1 Caillat

2 Q. Are you aware of any trade press
3 coverage or general press coverage relating
4 to the teamwork products?

5 A. No, I am not aware.

6 Q. You haven't seen any while you
7 were at Myron, while you have been at
8 Myron?

9 A. I one time saw an article about
10 direct marketing that was showing one of
11 our teamwork products as an example of good
12 direct marketing. That was it.

13 Q. Do you know if a copy of that
14 article has been retained by Myron?

15 A. I don't believe so. It was a
16 long time ago.

17 (Recess taken.)

18 FURTHER EXAMINATION BY MR. AIETA:

19 Q. Mr. Caillat, Myron is currently
20 in the process of sending out samples for
21 its 2008 dated products?

22 A. Yes.

23 Q. That's something you're doing
24 now?

25 A. Yes.

1 Caillat

2 Q. And for how long into the year
3 will you continue to do that?

4 A. Until November.

5 Q. You will still be sending out
6 samples for 2008 dated products in
7 November?

8 A. Yes.

9 Q. And how about promotions to your
10 customers, how late in the year will you
11 continue to do that for dated products?

12 A. I'm sorry, was the question
13 before relative to prospects?

14 Q. Prospects, yes.

15 A. Then I don't remember
16 specifically for prospects, if that's what
17 you were asking.

18 Q. Yeah, the first question was how
19 late into the year do you send out
20 promotions for prospects, samples for
21 prospects?

22 A. Last year we probably had some
23 fairly late in the year. This year I'm not
24 too sure.

25 Q. You're not sure when the end date

1 Caillat

2 will be for prospects?

3 A. Well, you are confusing me a
4 little bit because you keep going back
5 between calendars and teamwork and I'm not
6 sure which --

7 Q. Let me clarify my question for
8 you. With respect to all of the teamwork
9 SKU's which -- that are at issue in this
10 case, which I understand are all dated
11 products.

12 A. Yes.

13 Q. When do you anticipate will be
14 the last promotional mailing to prospects?

15 A. That's the one that I'm not
16 really sure, because we mailed a variety of
17 products in the prospect program this year,
18 and I'm not really sure when the last time
19 would be where one of these teamwork
20 products will be mailed. If I could help
21 with you last year's, I can do that.

22 Q. Okay, we'll get to last year in a
23 second. Is it your expectation that there
24 are still some mailings for dated teamwork
25 products to be done this year?

1 Caillat

2 A. This year in prospect we are not
3 sending as many as last year, so I'm not
4 too sure.

5 Q. Okay, and with respect to
6 customers, is it your understanding that
7 there are still some promotions to be done
8 to customers for 2008 dated teamwork
9 products?

10 A. I believe we have some upcoming,
11 yes.

12 Q. And do you have a sense as to
13 when the last one will be sent?

14 A. No, not from the top of my head.

15 Q. Referring to last year then, what
16 is your recollection as to when the last
17 dated product promotion for a teamwork
18 product to customers took place?

19 A. To customers, I believe we had
20 some up until November.

21 Q. And the same question for
22 prospects. When was the last promotion?

23 A. I believe we had some up until
24 October or November in prospect.

25 Q. With reference to the 2007

1 Caillat
2 calendar year, do you know how many samples
3 to prospects you sent out for teamwork
4 related products?

5 MR. JACOBSON: I'm going to
6 object. I mean, this is far afield
7 from where we talked about when we
8 spoke on the phone. This is along the
9 lines of information you said you were
10 not going to provide to me, so you're
11 asking him how many samples he sent
12 out?

13 MR. AIETA: Actually I don't
14 think it was, but if you want to have
15 this discussion off the record, I'm
16 happy to do that. If you'd like my
17 client to leave the room, we're happy
18 to do that too.

19 MR. AIETA: Well, we can discuss
20 off the record.

21 (Discussion off the record.)

22 (Recess taken.)

23 MR. AIETA: I think we can stop
24 there. That's fine.

25 (Time noted: 12:04 p.m.)

A C K N O W L E D G M E N T

STATE OF NEW YORK)
 : ss
COUNTY OF)

I, PATRICK CAILLAT, hereby
certify that I have read the transcript of
my testimony taken under oath in my
deposition of September 19, 2007; that the
transcript is a true, complete and correct
record of my testimony, and that the
answers on the record as given by me are
true and correct.

PATRICK CAILLAT

Signed and subscribed to before
me, this day
of , 2007.

Notary Public, State of New York

C E R T I F I C A T E

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

I, DAVID HENRY, a Notary Public within
and for the State of New York, do hereby
certify:

That PATRICK CAILLAT, the witness
whose deposition is hereinbefore set forth,
was duly sworn by me and that such
deposition is a true record of the
testimony given by such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I am
in no way interested in the outcome of this
matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 20th day of September,
2007.

DAVID HENRY

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E R R A T A

[illegible]

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